

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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In the Matter of the Application of CALIFORNIA)
WATER SERVICE COMPANY (U 60 W), a)
corporation, for an order authorizing it to increase)
rates charged for water service in its Chico District by)
\$6,380,400 or 49.1% in July 2008, \$1,651,100 or)
8.5% in July 2009, and by \$1,651,100 or 7.9% in July)
2010; in its East Los Angeles District by \$7,193,200)
or 36.5% in July 2008, \$2,034,800 or 7.6% in July)
2009, and by \$2,034,800 or 7.0% in July 2010; in its)
Livermore District by \$3,960,900 or 31.2% in July)
2008, \$942,200 or 5.6% in July 2009, and by)
\$942,200 or 5.4% in July 2010; in its Los Altos-)
Suburban District by \$5,172,500 or 30.5% in July)
2008, \$1,189,100 or 5.4% in July 2009; and by)
\$1,189,100 or 5.1% in July 2010; in its Mid-)
Peninsula District by \$5,435,100 or 23.7% in July)
2008, \$1,634,200 or 5.8% in July 2009, and by)
\$1,634,200 or 5.5% in July 2010; in its Salinas)
District by \$5,119,700 or 29.8% in July 2008,)
\$3,636,900 or 16.3% in July 2009, and by \$2,271,300)
or 8.7% in July 2010; in its Stockton District by)
\$7,474,600 or 29.0% in July 2008, \$1,422,400 or)
4.3% in July 2009, and by \$1,422,400 or 4.1% in July)
2010; and in its Visalia District by \$3,651,907 or)
28.4% in July 2008, \$3,546,440 or 21.3% in July)
2009, and by \$3,620,482 or 17.6% in July 2010.)
_____)

A.07-07-001
(Filed July 3, 2007)

**OPPOSITION OF CALIFORNIA WATER SERVICE COMPANY
TO THE DIVISION OF RATEPAYER ADVOCATES
MOTION FOR SUMMARY ADJUDICATION**

CALIFORNIA WATER SERVICE COMPANY
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February 8, 2008

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A.07-07-001
(Filed July 3, 2007)

**OPPOSITION OF CALIFORNIA WATER SERVICE COMPANY
TO THE DIVISION OF RATEPAYER ADVOCATES
MOTION FOR SUMMARY ADJUDICATION**

In accordance with Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), California Water Service Company (“Cal Water”) hereby provides its response to the “Motion of the Division of Ratepayer Advocates for Summary Adjudication,” which was filed by Division of Ratepayer Advocates (“DRA”) on January 25, 2008, in the above-captioned proceeding.

Division of Ratepayer Advocates (“DRA”) moves for summary adjudication in order to bar Cal Water from presenting costs associated with Postretirement Benefits other than Pensions (“PBOP”) for the Commission’s consideration in general rate case Application (“A.”) 07-07-001. Cal Water strongly objects to this motion and DRA’s attempt to disallow Cal Water from recovering known, quantifiable and allowable future PBOP costs in this rate proceeding. In opposition, Cal Water asserts that DRA has committed both procedural and substantive errors in the filing of this motion and, for the reasons detailed below, DRA’s motion should be denied.

I. GRANTING DRA’S MOTION FOR SUMMARY ADJUDICATION AMOUNTS TO A VIOLATION OF DUE PROCESS OF LAW PREJUDICIAL TO CAL WATER.

Although the Commission’s rules do not expressly prevent DRA from filing its motion for summary adjudication at this juncture,¹ it is both unusual and distressing that a motion attempting to significantly narrow the scope of issues for consideration by the Commission should come at the present, late stage of the administrative process. Should the Commission grant DRA’s motion despite its lack of substantive merit, the Commission would eliminate Cal Water’s sole opportunity for a timely hearing on its future PBOP costs, effectively disallowing recovery and amounting to a prejudicial dismissal on procedural grounds in violation of Cal Water’s right to due process of law.²

A. DRA’s Motion Seeks to Ban Consideration of a Subject Matter That Has Not Yet Been Tried Before the Commission - Cal Water’s Future PBOP Costs in Revenue Requirement for Test Year 2008-2009 and Subsequent Escalating Years.

Although DRA’s motion purports to only eliminate a duplication of issues between A.06-12-025 (“the PBOP case”) and this general rate case proceeding (A.07-07-001), the two cases

¹ California Public Utilities Commission Rules of Practice and Procedure, Rule 11.1(b); *see also*, CPUC Rule 11.2.

² *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 304-05 (1937) (“[T]he ‘inexorable safeguard’ of a fair and open hearing [must] be maintained in its integrity. The right to such a hearing is one of ‘the rudiments of fair play’ assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.”)

pertain to entirely different time periods of PBOP cost recovery and accrual and so do not substantively cover the same concerns. Under submission in the PBOP case are Cal Water's accounting, contributions, funding and ratesetting costs associated with **past PBOP costs** and the recovery of the **past-accrued** under-collection of PBOP costs (the so-called "regulatory asset"). In contrast, this general rate case proceeding involves the establishment of **future PBOP costs** in Cal Water's revenue requirement for Test Year 2008-2009 and subsequent escalating years. There has been no testimony, no evidence on the record and no opportunity for the parties to address the issue of **future** PBOP cost recovery in the PBOP case. Furthermore, the record in the PBOP case is now closed, leaving no opportunity in that proceeding to consider these issues going forward. Summary dismissal of Cal Water's future PBOP cost recovery in this proceeding forecloses such consideration **entirely**. A wholesale failure to grant Cal Water a hearing on future PBOP cost recovery would necessarily deprive Cal Water of its due process right to an opportunity for hearing and cause Cal Water readily calculable financial injury from the lack of timely rate relief for its prudent and reasonably calculated future PBOP costs.

B. Granting DRA's Summary Adjudication Motion Would Be Prejudicial to Cal Water.

Granting DRA's motion would disallow Cal Water from including in its test year revenue requirement what Cal Water alleges to be prudent and reasonably estimated test year costs without reaching such a decision on the merits. Disallowing inclusion of such test year costs in revenue requirement will necessarily have the result of understating Cal Water's proposed test year revenue requirement, and so will prevent Cal Water from proving its case for the rates that it believes it **can** prove are required to recover its reasonably estimated test year revenue requirement.

Cal Water has already prepared and served testimony, including rebuttal testimony, and has reasonably anticipated that incorporation of PBOP costs in the calculation of test year rates would be decided based on the substance of its application and testimony, along with the testimony of adverse parties. At this late stage in the proceedings, when the matter is queued up for evidentiary hearings and a decision on the merits, to deny consideration of a significant element of estimated test year revenue requirement on procedural grounds would amount to a premature and unwarranted judgment fundamentally prejudicial to Cal Water.

C. DRA Failed to Raise or Resolve Any Objections Regarding PBOP Cost Considerations at Earlier, More Appropriate Opportunities in this General Rate Case.

DRA had at least three earlier opportunities to raise the issue of whether Cal Water's PBOP costs should be considered by the Commission in this general rate case before raising it now, at the outset of settlement negotiations. DRA could have raised the issue on any of the following occasions: (i) in DRA's August 8, 2007 Protest of Cal Water's Application ("DRA Protest"); (ii) during the August 31, 2007 Prehearing Conference discussions; or (iii) at any time during the more than three months following the Prehearing Conference and preceding the December 11, 2007 filing of the Scoping Memo and Ruling of Assigned Commissioner and Assigned Administrative Law Judge ("Scoping Memo"). In addition, DRA could have addressed any issue relevant to Cal Water's PBOP costs included in Test Year revenue requirements in DRA's testimony served January 3, 2008.

While a DRA protest is generally a preliminary document filed prior to significant discovery and therefore is not expected to contain DRA's fully articulated set of issues, the Prehearing Conference and the resulting Scoping Memo both function to provide parties and the Commission with exactly that opportunity; to narrow, define and delineate the scope and boundaries of the issues in the case. The Scoping Memo provides that the "[a]ppropriateness of

all rate increases”³ is in the purview of this general rate case proceeding. The Scoping Memo does not catalogue a DRA objection to the PBOP cost considerations or otherwise eliminate such costs from the list of issues to be examined. DRA failed to raise any objection despite early familiarization with the complicated issues in the pending PBOP case, having already having made several detailed filings in that proceeding.⁴ Thus, consideration of Cal Water’s future PBOP costs, as a portion of Administrative and General (“A&G”) Expenses for its General Office and a component of revenue requirement on which proposed rates are based clearly falls within the scope of the issues appropriate for consideration in this proceeding.⁵

Moreover, DRA has already recognized the propriety of substantively evaluating the addition of Cal Water’s PBOP costs in the general rate case by participating in the development of a record on this very subject matter. For example, DRA’s Opening Testimony recommends decreasing Cal Water’s PBOP request to “an amount corresponding to the ‘pay-as-you-go’ level.”⁶ While Cal Water notes that such a recommendation is inconsistent with the Commission’s D.92-12-015 and also with DRA recommendations in prior proceedings, what is most significant about the recommendation is that DRA has prepared testimony addressing the amount of PBOP expense appropriate for inclusion in test year revenue requirement, which is inconsistent with DRA’s current position that PBOP costs should be removed from the discussion entirely. Cal Water simply wants to continue the development of this issue in the proper forum, which is this general rate case.

³ A.07-07.001, Scoping Memo and Ruling, at 3, emphasis added.

⁴ See, e.g., A.06-12-025, Protest of the Division of Ratepayer Advocates to Application, dated February 27, 2007; see also A.06-12-025, DRA Prehearing Statement (a DRA list of “issues” in the proceeding makes no mention of a request for a rate increase by Cal Water to cover future PBOP costs.)

⁵ Under the Rate Case Plan for Class A Water Companies, which governs this proceeding, the utility bears the burden of proving that its proposed rate increase is justified. D.07-05-062, App. A, at A-6. Among the minimum data requirements that the Rate Case Plan requires Cal Water to submit are its A&G expenses for the last authorized test year, last five years recorded data and proposed test year. *Id.* at A-24. PBOP costs are an element of A&G expenses for Cal Water’s General Office.

⁶ A.07-07-001, DRA Report on General Office for California Water Service Company for Test Year 2008-2009, dated January 3, 2008, at 3-29.

D. Granting DRA's Summary Adjudication Motion Has Undermined the Settlement Process.

As mentioned above, DRA filed this motion on the scheduled first day of settlement negotiations between the parties.⁷ The inopportune timing of filing lends itself to the impression (whether intended or not) that DRA did not intend to participate in good faith in those negotiations. This undermined the efficacy and legitimacy of settlement negotiations. The effect of granting DRA's motion would be to exacerbate this result, a consideration the Commission should consider when weighing the merits of the motion.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT BAR THE COMMISSION FROM CONSIDERING FUTURE PBOP COSTS AS PART OF CAL WATER'S A.07-07-001 GENERAL RATE CASE REQUEST.

As correctly stated by the DRA motion, collateral estoppel may preclude relitigation of an issue "once a court has decided [such] issue of fact or law necessary to its judgment." However, because the doctrine's twin goals of promoting judicial economy and preventing inconsistent judgments⁸ come at the expense of a party's participation and determination of rights before the court, a party may not be barred where the elements of collateral estoppel have not been met. Satisfaction of these elements protects a party from being deprived of a fair adversarial proceeding in which to fully present the party's case.⁹ Importantly here, an agency decision is entitled to collateral estoppel effect in a subsequent proceeding **only** if the issue before the agency was "identical" to the issue in the prior proceeding and if the issue was "actually litigated, i.e., raised in pleadings or otherwise, submitted for determination, and determined."¹⁰ A comparative review of the PBOP case and this general rate case proceeding

⁷ A.07-07-001, Scoping Memo, at 5.

⁸ *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Rodgers v. Sargent Controls & Aerospace*, 136 Cal.App. 4th 82, 89-90 (2006).

⁹ *See, Long Beach Grand Prix Assn. v. Hunt*, 25 Cal.App. 4th 1195 (1994).

¹⁰ *Barker v. Hull*, 191 Cal.App. 3d 221, 226 (1987).

shows that neither of these elements is satisfied.¹¹ Therefore, the doctrine of collateral estoppel may not be invoked to bar Cal Water's Test Year PBOP costs from consideration for inclusion in revenue requirement in this general rate case proceeding.

A. The Issues in the PBOP Case are not "Identical" to the Issues in This Proceeding.

The doctrine of collateral estoppel is premised upon "the sound policy of limiting litigation by preventing a party [that] has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination."¹²

In *Darlington v. Basalt Rock Company*, 188 Cal. App. 2d. 706 (1961), the court denied consideration of certain issues on the basis of collateral estoppel. The plaintiff had made a motion to set aside the compromise of a personal injury claim after having **already lost** that **same motion** on the **same grounds** in a previous court. The court found that "identity of issues on the motion and in this action is plain,"¹³ that "there can be no question that the grounds urged on the motion are the same as those now advanced"¹⁴ and that the issue had been "fully litigated and determined."¹⁵ The court barred the plaintiff from presenting the **same issues** on the **same basis** for a second time because the identical issues had already been **decided** after full opportunity for their development.

Conversely, the issues DRA seeks to have eliminated from the Commission's consideration in this proceeding are far from "identical" to those pending before the Commission in A.06-12-025. Cal Water filed Application (A.) 06-12-025 in order to recover the **past-accrued** regulatory asset associated with the funding of its retiree healthcare plan commonly

¹¹ Prior or concurrent litigation is not sufficient to support application of the collateral estoppel doctrine. A prior **determination** must be shown, an element entirely absent in this case. *See id.*

¹² *Gonzales v. Toews*, 111 Cal.App. 4th 977, 982 (2003).

¹³ *Darlington v. Basalt Rock Company*, 188 Cal.App. 2d. at 707.

¹⁴ *Darlington v. Basalt Rock Company*, 188 Cal.App. 2d. at 709.

¹⁵ *Id.* at 710.

referred to as Postretirement Benefits other than Pensions (“PBOP”).¹⁶ The substantive issues currently under consideration by the Commission in A.06-12-025 are (i) whether to allow Cal Water to recover the regulatory asset accrued in **past** years under the pre-2005 financing method **previously** employed by Cal Water and (ii) whether the Commission should impose penalties on Cal Water’s **past** conduct in the event that Cal Water is not permitted to recover its **previously-accrued** regulatory asset.

In contrast, in this general rate case, Cal Water requests recovery of (i) the costs of fully funding **future** PBOP costs for the 2008-2009 test year and (ii) the first year of amortization of the regulatory asset (implementation of a Commission decision favorable to Cal Water in the pending PBOP case). The costs associated with this two-part PBOP rate request break down as follows: (i) \$5,900,000 attributable to fully funding Cal Water’s **future** PBOP costs for the 2008-2009 test year and (ii) a \$658,000 installment reflecting the proposed 15-year amortization of Cal Water’s regulatory asset.¹⁷

With respect to the first figure, a rate increase request for **future** PBOP costs is contemplated in this general rate case proceeding **only**. A request for a rate increase to cover future PBOP costs is not the subject of the pending PBOP case.¹⁸

Furthermore, to the extent that the PBOP case relates to PBOP costs incurred going into the future, the positions of the parties are not in fundamental conflict. DRA argues that Cal

¹⁶ See, A.06-12-025, Opening Brief of Cal Water, at 1-2; *see also*, A.06-12-025, Reply Brief of Cal Water, at 1 (although the Application of Cal Water dated December 21, 2006, requests an increase in rates reflecting PBOP, no other filing, nor testimony by either party or evidentiary record contain a Cal Water request for an increase in rates reflecting PBOP costs. The Cal Water Opening Brief and Reply Brief make clear that Cal Water’s request for an increased level of funding for PBOP costs has been set aside for consideration in this proceeding, the general rate case, only. Additionally, neither the DRA’s March 26, 2007 Prehearing Statement nor the Commission’s April 5, 2007 Scoping Memo contain a request by Cal Water to increase rates to reflect future PBOP costs.)

¹⁷ A.07-07-001, Opening Testimony of DRA, § 3.78 at 3-29.

¹⁸ Neither party presented testimony regarding a request by Cal Water for a rate increase for future PBOP costs nor does the evidentiary record show a request by Cal Water for a rate increase for future PBOP costs.

Water should be fully funding future PBOP costs.¹⁹ Cal Water has **already** established full funding of future PBOP costs with the 2005 addition of a VEBA account to the 401(h) independent trust account. The practical result is that a final Commission order in the PBOP case on the accounting method for future PBOP costs has no effect upon this general rate case. This proceeding does not contest, undermine, or attempt in any way to argue against fully funding future PBOP costs. Therefore, this proceeding does not “relitigate” the backwards-looking issues of propriety over accounting methods dominating the PBOP case.

With respect to the second figure, the annual amount attributable to a successful request for amortization of Cal Water’s regulatory asset in the pending PBOP case, the issues are again, entirely unique to each respective proceeding. The forum for discussing the merits of allowing a PBOP surcharge based on a detailed and complicated analysis of Cal Water’s accounting accrual in **past** years is the PBOP case. Whether to allow Cal Water to recover its regulatory asset is **not** the subject of the general rate case, nor are those issues artificially inserted into this proceeding by virtue of the inclusion of the amortized amount in Cal Water’s general rate request.²⁰ Instead, the general rate case references this prospective PBOP surcharge as little more than a placeholder pending resolution of the PBOP case.²¹

The necessity for including the amortization amount before final judgment in the PBOP case is precipitated by the Commission’s own rules regarding notice. The possibility of a surcharge reflecting regulatory asset recovery through general rates must be noticed from the onset of a general rate case proceeding in order to meet the Commission requirement calling for

¹⁹ DRA Opening Brief, at 38-39 (DRA states, “[t]he Commission should adopt DRA four recommendations that should make the ratepayers whole, compel Cal Water to comply with D.92-12-025 as soon as practical . . . [including] [r]estore the PBOP trusts to full compliance levels by ratepayer funding of . . . the full FAS106 accrual to the extent i[t] can be placed in tax-advantaged, independent PBOP trusts.”)

²⁰ A.07-07-001, Reply Testimony of John Tootle, at 3, fn 6.

²¹ *Id.*

disclosure of the maximum potential increase.²² Accordingly, disclosure of a surcharge for the regulatory asset recovery under concurrent consideration and fast-approaching resolution is necessary.²³

Therefore, there is no duplication of issues between the two proceedings sufficient to justify DRA's motion to exclude Cal Water's request for recovery of PBOP costs in the general rate proceeding. While both proceedings address PBOP costs, the issues requiring resolution by the Commission in each respective case involve independent inquiries and have independent consequences for Cal Water's rights and obligations and clearly do not rise to the level of commonality required by collateral estoppel. The collective PBOP cost issues spanning the two pending Cal Water proceedings cannot be dispensed with by the resolution of a single case. Both merit careful consideration and dispensation by the Commission after the opportunity for hearing.

B. Absent a Final Decision in the PBOP Case, Collateral Estoppel Does Not Apply.

In addition to the requirement that the issues be identical between the two cases, collateral estoppel bars relitigation of issues previously litigated only if the former decision was final on the merits.²⁴ A judgment is considered final when it "terminates the litigation between the parties on the merits and leaves nothing in the nature of judicial action to be done."²⁵ Therefore, in the context of an administrative proceeding²⁶ only a final order can operate as a conclusive adjudication and have collateral estoppel effect. Here, we are not only lacking a **final** order, but there has been **no decision at all** in A.06-12-025.

²² *Id.*; see also, CPUC Rule 3.2.

²³ Administrative Law Judge's Ruling Granting DRA's Request for a Revised Schedule, at 2 (indicating a revised final judgment date of February - March 2008, no later than 60 days after issuance of the Proposed Decision in January - February 2008.)

²⁴ See generally, *Coscia v. McKenna & Cuneo*, 25 Cal. 4th 1194 (2001); see, e.g., *Pajaro Valley Water Management Agency v. McGrath*, 128 Cal.App. 4th 1093, 1100 (2005).

²⁵ *Nave v. Taggart*, 34 Cal.App. 4th 1173, 1177 (1995).

²⁶ *Taylor v. Lockheed Martin Corp.*, 113 Cal.App. 4th 380 (2003).

DRA effectively makes Cal Water's case **against** the applicability of collateral estoppel in the very motion requesting the doctrine be marshaled at Cal Water's expense. DRA plainly states; "[a]lthough a final decision has not been adopted in A.06-12-025, the doctrine of collateral estoppel should still apply"²⁷ DRA's statement appears to be based on the erroneous assumption that the elements of collateral estoppel are merely guidelines instead of requirements established to protect parties from the unjust denial of a fair hearing. Granting DRA's motion would ignore the case law's cautiously methodical approach to wielding such a powerful bar and the public policy considerations upon which such a careful approach is based.

Therefore, the premise underlying collateral estoppel, that a party be barred from having two bites at the apple with respect to one or more issues already actually litigated and determined²⁸ simply does not apply here. Accordingly, the Commission should reject DRA's urging to forego such consideration. Instead, the Commission should deny DRA's motion and should adopt Cal Water's requested revenue requirement for the test year and escalation years, subject to adjustment should a decision in A.06-12-025 warrant such adjustment. The annual surcharge attributable to Cal Water's proposed amortization of its past accrued "regulatory asset" should be established as well, also subject to adjustment based on a decision in A.06-12-025 as to whether such prospective amortization should be recoverable in future rates.²⁹

As an alternative to establishing an annual surcharge in the general rate decision that amortizes the regulatory asset requested in A.06-12-025, the issue could be deferred to a "Phase 2" of the present general rate case. Deferring this issue will allow Cal Water to implement any amortization of the regulatory asset authorized in A.06-12-025.

²⁷ A.07-07-001, Motion of the DRA for Summary Adjudication, at 3.

²⁸ See, e.g., *Barker v. Hull*, *supra*.

²⁹ A.07-07-001, Reply Testimony of John Tootle, at 2, line 1-3, fn. 1.

III. CONCLUSION

For the procedural and substantive reasons detailed above, DRA has failed to provide legal grounds for its motion to bar consideration either of Cal Water's future PBOP costs from inclusion in its test year revenue requirement or of the amortized recovery of its "regulatory asset". Granting this motion would be a denial of due process highly prejudicial to Cal Water. Therefore, Cal Water respectfully requests that the Commission deny DRA's Motion for Summary Adjudication and allow the parties to continue to negotiate and present the evidence on the propriety of all components of Cal Water's rate increase request, including reasonable future PBOP costs.

DATED this 8th day of February, 2008, at San Jose California:

Respectfully submitted,
CALIFORNIA WATER SERVICE COMPANY

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CERTIFICATE OF SERVICE

I, Jeannie Wong, hereby certify that on this date I will serve the foregoing OPPOSITION OF CALIFORNIA WATER SERVICE COMPANY TO THE DIVISION OF RATEPAYER ADVOCATES MOTION FOR SUMMARY ADJUDICATION by electronic mail or hand delivery on the attached service list for Application No. 07-07-001:

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Executed this 8th day of February, 2008, in San Francisco, California.

/S/ JEANNIE WONG

Jeannie Wong

CALIFORNIA PUBLIC UTILITIES COMMISSION

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PROCEEDING: A0707001 - CAL WTR SERVICES CO.
FILER: CALIFORNIA WATER SERVICE COMPANY
LAST CHANGED: JANUARY 24, 2008

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